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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1069~~ 73

FIRST SECURITY BANK OF UTAH, N.A., *Petitioner,*

v.

COMMERCIAL SECURITY BANK, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN J. WILSON
CHARLES J. STEELE
815 - 15th Street, N.W.
Washington, D. C. 20005
Counsel for Petitioner

WHITEFORD, HART, CARMODY
& WILSON
Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
OPINIONS BELOW	1, 1a
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	2, 3
STATEMENT	3
SPECIFICATION OF ERRORS TO BE URGED	4
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	10

APPENDIX (A) OPINIONS BELOW IN THIS CASE	1a
APPENDIX (B) STATUTES	11a
APPENDIX (C) CONFLICTING OPINION	13a

CITATIONS

CASES:

First National Bank of Smithfield, North Carolina v. *James J. Saxon*, — F. 2d — (4th Cir., 1965) 4, 5, 7, 8, 11

Mercantile National Bank v. *Langdeau*, 371 U.S. 555 (1963) 8

Van Reed v. *Peoples National Bank*, 198 U.S. 554 (1905) 8

Walker Bank & Trust Company v. *James J. Saxon*, — F. 2d — (10th Cir., 1965) 3, 4, 5, 11

Walker Bank & Trust Company v. *James J. Saxon & First National Bank of Logan*, 234 F. Supp. 74, 77 9

Whitney National Bank of Jefferson Parish v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965) ...9, 10

STATUTES:

12 U.S.C. § 36(c) 3, 6, 7, 8

12 U.S.C. § 36(c)(1) 2, 4, 6, 7, 9

12 U.S.C. § 36(c)(2) 6, 7

28 U.S.C. § 1254(1) 2

Utah Code Ann. 1953, § 7-3-6 2

Utah Code Ann., Title 10, Chap. 1, § 1 (1953) 3

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-captioned case on November 18, 1965.

OPINIONS BELOW

The opinion of the District Court is reported in 236 F. Supp. 457. A true copy appears in Appendix A to this brief. The judgment of the Court of Appeals, rendered without opinion, will not be reported. A true copy appears in Appendix A to this brief.

JURISDICTION

The judgment of the United States Court of Appeals was entered on November 18, 1965. (R. 67). The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

1. WHETHER, in view of the provisions of United States Code, Title 12, Sec. 36(c)(1), as amended, which empowers the Comptroller of the Currency

> : to authorize national banks to establish and operate branches within the limits of the city in which said national bank is situated, if such establishment and operation are at the time expressly authorized to State banks by the laws of the state in question,

and further in view of Utah Code Annotated, 1953 Sec. 7-3-6, as amended, under the provisions of which State banks may establish and operate branches in Ogden by acquiring an existing State bank, THE COMPTROLLER OF THE CURRENCY HAD THE AUTHORITY TO AUTHORIZE PETITIONER TO ESTABLISH AND OPERATE A BRANCH IN OGDEN, UTAH.

WHETHER Respondent had the necessary standing to bring the action below.

STATUTES INVOLVED

The pertinent statutory provisions, both federal and state, are set forth in Appendix B to this brief.

STATEMENT

The facts are not in dispute. Petitioner is a national bank with its principal office and one branch in Ogden, Utah. Respondent is a state bank with its principal office and one branch likewise in Ogden, Utah. (R. 20, 23, 24).

Two other state banks have their main offices in Ogden, namely, the Bank of Utah and the Bank of Ben Lomand. (R. 20, 23).

Ogden is classified as a city of the second class under the Utah Bank Statute (Utah Code Ann. Title 10, Chap. 1, Sec. 1, (1953, as amended)). (R. 20, 24).

On June 25, 1963, the Petitioner filed an application with the Comptroller of the Currency, pursuant to Title 12, United States Code, Section 36(c), requesting permission to establish a second branch in Ogden. On July 18, 1963, the Respondent brought the action below, seeking to enjoin the Comptroller of the Currency from approving the branch application on the ground that it would violate 12 U.S.C. § 36. On June 9, 1964, the Comptroller notified Petitioner that its branch application had been approved, but the district court enjoined the Comptroller from issuing the Certificate of Authority to Petitioner, which was necessary before the branch could be opened. (R. 19, 20).

The Court of Appeals then affirmed the district court, without opinion, merely citing *Walker Bank & Trust Company* v. *James J. Saxon,* F. 2d (10th Cir., 1965).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals erred:

1. In holding that the Comptroller did not have statutory authority to authorize Petitioner to establish and operate a branch bank in Ogden, Utah.

2. In holding that Respondent had the necessary standing to bring the action below, and

3. In affirming the Order of the District Court.

REASONS FOR GRANTING THE WRIT

(A) Conflict in Circuits:

The decision of the courts below in the instant case and in *Walker Bank & Trust Company* v. *James J. Saxon,* F. 2d (10th Cir., 1965), upon the authority of which the instant case was decided, are directly in conflict with the decision and opinion of the United States Court of Appeals for the Fourth Circuit in *First National Bank of Smithfield, North Carolina* v. *James J. Saxon,* F. 2d (4th Cir., 1965).[1]

The basic issue in this case may be described as follows: 12 U.S.C. § 36(c)(1) provides, in effect, that in a given city, if a state bank can establish a branch there, then the Comptroller of the Currency can authorize a national bank to establish a branch there. In our case, it is undisputed that a state bank can establish a branch in Ogden, Utah. Since this is so, the Comptroller and Petitioner reasoned, then a national bank can also establish a branch there. Respondent State bank, however, took the position that since a state bank could establish a branch bank in Ogden only by means of acquiring an existing Ogden

[1] This opinion is set forth in full as Appendix C to this brief.

bank, then a national bank can establish a branch only by acquiring an existing Ogden Bank. The Comptroller and Petitioner reply that the Comptroller is not bound by State criteria as to the "method" or "means" of establishing a branch, and since a State bank can open a branch in Ogden under Utah law, so too, with the Comptroller's authorization, can a national bank. The Court of Appeals in the instant case and the Tenth Circuit in *Walker Bank, supra,* agreed with Respondent.[2] In the *Smithfield* case, *supra,* the Fourth Circuit agrees with Petitioner.

In *Smithfield,* the First National Bank of Eastern North Carolina applied to the Comptroller of the Currency for authorization to establish a branch in the town of Smithfield, North Carolina. The applicant had its principal office at New River, North Carolina, and also had eleven branches in the eastern part of the State. Subsequently, the Comptroller of the Currency gave the necessary approval to the applicant Bank, but without a formal statement of facts, conclusions of law or opinions. A rival State bank, the Bank of Smithfield, then brought an action to have the Comptroller's determination declared illegal and enjoined. The State bank contended that the Comptroller's approval to a national bank to branch is contingent upon compliance by the Comptroller with the inquiries and ascertainments required of the State Commissioner of Banks by North Carolina law. The North Carolina law provided that no branch should be permitted save upon the approval of the Commissioner of Banks, which "may be given or withheld by . . . [him] in his dis-

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[2] Petition for a writ of certiorari to the Tenth Circuit was filed in this Court on January 4, 1966 by the First National Bank of Logan. It bears number 875 October Term 1965.

cretion"; that "in exercising such discretion . . . [he] shall take into account, but not by way of limitation, such factors as the financial history and condition of the applicant bank . . . its future earnings prospects, and the general character of its management"; and that the approval shall not be given until the Commissioner shall have "ascertained to his satisfaction (i) that the establishment of such . . . will meet the needs and promote the convenience of the community to be served by the bank and (ii) that the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of said branch . . . and of the existing bank or banks in said community."

The State bank argued that all of these requirements of North Carolina law were incorporated into 12 U.S.C. 36(c). In answer, the Fourth Circuit said (page 18a, Appendix):

> "We disagree with the argument. Assuming arguendo that the North Carolina Statute does demand as a condition precedent to the approval of a branch, an ascertainment of need and convenience, with discretion in decision nevertheless always retained by the Commissioner, in our judgment, this command has not been extended to the Comptroller by the National Banking Act.
>
> "That the phrase 'restrictions as to location"[3] does not advert to economic factors of need and convenience, but refers exclusively to a geographical de-

[3] While the Court was speaking of 12 U.S.C. 36(c)(2), and the statute involved in the instant case is 12 U.S.C. 36(c)(1), still the principle is the same. In both cases, the State bank maintains that all conditions placed upon State banks by State law are by 12 U.S.C. 36(c) also placed upon the Comptroller of the Currency. It is the adoption of this theory upon which the decision below in the instant case was based.

> termination is quite plain from the legislative history of the Act.".

The Fourth Circuit, in *Smithfield,* (page 21a, Appendix), then went on to say:

> "The standards by which the Comptroller's action will be measured are, first, the criteria enumerated in the Banking Act, 12 U.S.C. 36(c), Supra, viz: whether the establishment of the branch is 'authorized to state banks' and the location conformed to the restriction of State laws."

In the instant case, the restriction as to location does not expressly appear because that restriction is found in 12 U.S.C. 36(c)(2), and not 12 U.S.C. 36(c)(1). Petitioner agrees with the Fourth Circuit that the criterion is "whether the establishment of the branch is 'authorized to State Banks' ". In the instant case, the establishment of a branch is authorized to a State bank in Ogden, Utah, and the fact that the State places the additional requirement dealing with the means of establishing the branch, i.e., merger or acquisition, does not mean, as the Court below held, that these conditions are also read into federal law and placed upon the Comptroller of the Currency.

The Petitioner respectfully submits to this Court that there is a clear conflict now between the Fourth Circuit in the *Smithfield* case, on the one hand, and the District of Columbia and the Tenth Circuits, on the other hand.

(B) Importance of the Question:

Clearly the question presented is of the utmost importance to the regulation and growth of the Federal banking system, to the place of the Comptroller in that

system with relation to branch banking, and to the extent to which State laws impose restrictions upon the Comptroller of the Currency in connection with his authorization of branch banks. If, as the Court below in the instant case held, the Comptroller is bound by State statutory criteria, in addition to those expressly set forth in 12 U.S.C. Section 36(c), then a substantial amount of chaos has been injected into the Federal regulation of National Bank branches.

(C) The Decision of the Court Below Was Erroneous:

The decision of the Court below is, Petitioner submits, erroneous and the conflicting decision of the Fourth Circuit Court of Appeals in *First National Bank of Smithfield* v. *James J. Saxon, supra,* correct.

Had it wished to establish a "policy of equalization" putting State and Federal banks on an exact basis of equality with respect to branching, Congress could have done so by simply enacting a statute making National banks subject to the State laws governing State banks in the particular State in which the National bank was located. Congress, however, did not do this. National banks are subject to the laws of the United States and are not subject to the laws of the State, except insofar as Congress has expressly provided. *Van Reed* v. *Peoples National Bank,* 198 U.S. 554 (1905); *Mercantile Nat'l Bank* v. *Langdeau,* 371 U.S. 555 (1963). It is clear that unless Congress has expressly provided that the laws of the State of Utah dealing with the method of establishing a branch of a State bank shall also control the method whereby National banks may establish branches, then the action of the Comptroller in authorizing the branch to Peti-

tioner was proper, and the judgment of the Court below should be reversed.

The words of 12 U.S.C. 36(c)(1), the governing statute, are clear and unambiguous. That Section provides that a national bank may, with the Comptroller's approval, establish a branch within the limits of the city in which it is situated, if such establishment is at the time expressly authorized to State banks by the laws of the State in question. As Judge Christenson found in *Walker Bank & Trust Co.* v. *James J. Saxon and the First National Bank of Logan,* 234 F. Supp. 74, 77,[4] branches *are* expressly authorized to State banks by Utah law under the circumstances of the present case. No one really takes issue with the fact that both Petitioner, a State bank, and Respondent, a National Bank, are authorized to establish branches in Ogden, Utah. The crux of the case is whether Petitioner is bound by the condition of "acquisition" placed upon State banks by a State statute. No federal statute states that this State limitation on the method of establishing a branch shall apply to national banks, and no one even suggests that other State conditions, such as those dealing with capitalization and other requirements, apply to national banks.

Indeed, this Honorable Court, in *Whitney National Bank of Jefferson Parish* v. *Bank of New Orleans and Trust Co.,* 379 U.S. 411 (1965), recognized, at least impliedly, that the restrictions contained in State laws deal only as to the question of "where" the comptroller may authorize a branch and not as to "how", the Comptroller may authorize a branch.

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[4] Reversed in the *Walker Bank* case, discussed above.

In the *Whitney,* case, this Court said:

> "La. Rev. Stat. § 6:54 (1950) prohibits banks from opening branch offices in parishes other than their home parish, and these *geographical limitations* are made applicable to national banks by the Banking Act of 1933, 12 U.S.C. § 36(c)(2) (1958 Ed.)." (Emphasis added). 379 U.S. 411, 13 L. ed. 2d 386, 390, Footnote 1.

The theory of Respondent and of the Court below, should it become the law of the land, could severely cripple the discretion which Congress intended the Comptroller of the Currency to have. In the instant case, for example, the Utah Statute provides that a bank must be in existence for at least five years before it can be acquired to be used as a branch by another bank. Assume a national bank has been in existence for less than five years, and is in such dire financial straits as to be on the brink of failure. Another national bank wishes to acquire it, and the Comptroller, wishing to prevent the failure, determines to follow the oft-used course of preventing the failure by merging the unsound bank with a sound bank. Under the theory of the Court below in the instant case, this cannot be accomplished because state law does not allow a bank to be acquired as a branch until the bank is in existence five years, and, so the Court has ruled, State law governs the Comptroller under circumstances such as these.

CONCLUSION

Petitioner submits that the exact point on which the Court below was in error is the same point which lends such importance to this case, namely, just what state criteria are binding upon the Comptroller of the

Currency in connection with branching by National banks. Petitioner respectfully submits that the Fourth Circuit in *Smithfield* was correct and that the Court of Appeals below in the instant case, and the Tenth Circuit in the *Walker Bank* case, were incorrect in their holdings.

For the reasons set forth, therefore, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN J. WILSON
CHARLES J. STEELE
Counsel for Petitioner
815 - 15th Street, N.W.
Washington, D. C. 20005

February, 1966